United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELLIS-BARKER SILVER CO. INC.,

Plaintiff-Appellant,

against

RIDGWAY POTTERIES LIMITED,

Defendant-Appellee.

APPELLANT'S BRIEF

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Plaintiff appeals from an order of the United States District Court for the Southern District of New York (Hon. Milton Pollack, Judge) which dismissed its complaint on two grounds. Judge Pollack's decision, a memorandum endorsement, granted the defendant's jurisdictional motion "on the grounds of the existence of an enforcible forum stipulation and the dictates of forum non conveniens" (A51).

Questions Presented

1. Did the District Court err, under the standards of *Gulf Oil Corp.* v. *Gilbert,* in granting a *forum non conveniens* dismissal on a record which fails even to allege, much less demonstrate, a single factor sufficient to disturb the plaintiff's choice of forum?

2. Did the District Court err in deciding that the plaintiff had waived its right to commence this action in New York

by a contractual consent to submit to English jurisdiction under a clause, drafted by the defendant and stating that "in any dispute, the [*plaintiff*] *shall submit to* the Supreme Court of Judicature in England as the sole competent tribunal for determining the same?" (Emphasis supplied)

3. Having construed the subject contract to find that the plaintiff had agreed to limit its choice of forum, did the District Court, sitting in a diversity case, err in deciding that such an agreement should be enforced?

Statement of the Case

This is an action for breach of an exclusive distributorship contract, in which the American plaintiff-distributor seeks to recover sales commissions due as a result of the English defendant-manufacturer's direct sales in the United States. Plaintiff also seeks an accounting to establish the amounts due.

Statement of Proceedings

The action was commenced in the Supreme Court of the State of New York, County of New York, by personal service of the summons and complaint, on February 5, 1974, in England (A7-8).*

The defendant, on March 7, 1974, removed the action to the United States District Court, Southern District of New York, without opposition from the plaintiff (A9).

Thereafter, on April 26, 1974, defendant moved to dismiss the complaint, claiming (i) lack of personal jurisdiction, (ii) that the parties had "stipulated" that actions on the agreement may only be brought in England and (iii) *forum non conveniens* (A14-15).

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* The Appendix is cited herein as "A".

The District Court, on hearing the defendant's motion, decided that the subject contract provision was an enforceable forum stipulation clause. The District Court further granted the *forum non conveniens* portion of defendant's motion (A52). The District Court was silent as to defendant's claim of lack of personal jurisdiction; though, by implication, such jurisdiction was presumably found.

Statement of Facts

Plaintiff, Ellis-Barker Silver Co., Inc., a Delaware corporation having its principal office in New York ("Ellis-Barker") is a distributor and sales agent for imported china and silver (A32). In the summer of 1967, plaintiff's predecessor, Exclusive China Company, Inc., a New York corporation ("Exclusive"), was seeking an additional source of imported merchandise to sell. Mr. Frederick Hart, president of Exclusive, contacted the British Consul in New York for assistance in locating a chinaware manufacturer who needed a representative in New York (A32). The British Consul advised that the "'Royal Adderley' people" might be interested (A32) and, through the British Consul, contact was established with Allied English Potteries Limited, parent company of the defendant Ridgway Potteries Limited, an English company ("Ridgway") (A32). Ridgway manfactured, among other things, a line of ornamental china under the name Royal Adderley.

Thereafter, Mr. George Cliff of Ridgway came to New York for extensive discussions and negotiations centering on Royal Adderley ornamental china and the dinnerware products of Paragon China Ltd., an affiliated company (A32-33). Negotiations then moved to England and finally, in the fall of 1967, Exclusive entered into an agreement with Ridgway whereunder Exclusive was appointed the sole distributor and agent for United States sales of Royal Adderley at a commission rate of 10%, including a

full commission on orders taken at the defendant's offices in England (A24, 26). The agreements were executed in New York for Exclusive and in England for Ridgway (A33).

In July, 1971, Exclusive, with the consent of Ridgway, assigned its interest in the agreement to Ellis-Barker (A30).

Soon after execution of the agreements, the parties established a working relationship involving regular and systematic visits by representatives of each party to the offices of the other (A35).

Among the business visitors to Ellis-Barker in New York were George Cliff and Gordon Lawton, merchandising and production personnel from Ridgway, and Raymond Weightman, a director of Allied English Potteries Limited until 1972, when Allied English Potteries Liimited was merged into Royal Doulton Tableware Limited. It is believed that Mr. Weightman was also a director of Ridgway (A34).

In 1970, Allied English Potteries Limited established at 11 East 26th Street, New York, New York (the building in which Ellis-Barker had its offices), an office for, among other things, the sale of Ridgway products other than Royal Adderley china (A34). To Ellis-Barker's knowledge, the sales office did not compete with the plaintiff in United States sales under the Royal Adderley name.

During one of George Cliff's visits to New York in 1969 or 1970, Mr. Cliff advised Frederick Hart that he was negotiating an important deal to supply china decanters to an American importer of Scotch whiskey, though he did not then tell Mr. Hart that the sale involved Royal Adderley (A35). Nor was there any reason to believe the decanters would be sold under the name Royal Adderley, since Ridgway made and sold china under other names and could well have used any of them. It is not difficult to imagine the plaintiff's reaction when advertisements began to ap-

pear in New York later in 1970 for Royal Adderley china scotties filled with Scotch whiskey (A46). The ad stressed the quality of the Royal Adderley product.

Having devoted three years and considerable effort to developing the name Royal Adderley in the United States, Ellis-Barker learned that Ridgway now intended to obtain the benefits of Ellis-Barker's efforts under distribution agreement without meeting its financial obligations thereunder.

In January, 1973, Ridgway terminated the exclusive distribution agreement by exercising a twelve-months notice provision (A48).

The second count of the complaint is a claim for commissions due under an agreement whereby Ridgway was to pay Ellis-Barker commissions of 7½% of the sales price on products designed by one Nan Prussack and sold outside the United States by Ridgway.

POINT I

The defendant has failed to offer a single fact or condition justifying the exercise of the District Court's discretion to grant a *forum non conveniens* dismissal.

It is passing strange that a defendant seeking a *forum non conveniens* dismissal should omit from its moving affidavits all explanation of the factual grounds in support of its motion. Ridgway's silence is, indeed, stunning, in light of the *forum non conveniens* standards enunciated by the Supreme Court in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947) and the New York Court of Appeals in *Silver* v. *Great American Ins. Co.,* 29 N.Y.2d 356, 278 N.E. 2d 619, 328 N.Y.S.2d 398 (1972), and consistently applied by this Court.

> "In any situation the balance must be very strongly in favor of the defendant before the plaintiff's choice

> of forum should be disturbed . . . and the balance must be even stronger when the plaintiff is an American citizen and the alternative forum is a foreign one."
>
> *Olympic Corp.* v. *Societe Generale,* 462 F.2d 376 (2d Cir., 1972).

An examination of the moving affidavits (A18, 21, 47) reveals a picture devoid of a single element which would entitle the defendant to a serious claim of *forum non conveniens.* On the contrary, five of the eight paragraphs of Mr. Bernard Cordon's reply affidavit attest to the ease with which Ridgway can produce its representatives in New York. (A49, 50, ¶¶ 3, 4, 5, 7, 8); a sixth paragraph refers to the existence of a New York office of an affiliated company which sold Ridgway's products in New York during the period relevant to the complaint in this action (A50, ¶ 6).

Even a cursory consideration of the principles set forth in *Gulf Oil Corp.* v. *Gilbert, supra,* must lead to the conclusion that Ridgway has not met any of the grounds on which a *forum non conveniens* dismissal could be supported, nor has a single one been claimed.

> "If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said

> that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." 330 U.S. at 508

To require Ellis-Barker to demonstrate that balance in its own favor would imply the existence of *some* claim of inconvenience, harassment or injustice on Ridgway's part. But the record is searched in vain for the slightest hint that Ridgway would suffer injury or inconvenience by reason of Ellis-Barker's choice of forum.

Plaintiff-appellant recognizes that the "doctrine of *forum non conveniens* leaves much to the discretion of the court to which the plaintiff resorts" (*Gulf Oil Corp.* v. *Gilbert,* 330 U.S. at 508), with full respect for the wisdom of experience and flexibility. That is why the decision of the District Court is particularly astonishing and unaccountable in this case. If there were a single element to justify the defendant's claim of inconvenience, surely it would have been set forth at some place in the record. That part of Ridgway's motion seems, instead, to have been merely an afterthought thrown in for good measure.

On records where actual inconvenience has been found, this Court has, in the past, declined to deny American citizens access to the courts of this country, absent a compelling reason. In *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326 (2d Cir. 1972), this Court, in deciding an informal application to mandamus the District Judge to dismiss on the ground of *forum non conveniens,* stated that apart from the legal advantages the defendants would obtain from a trial in England, such a dismissal would not be warranted because:

> "Despite plaintiff's arguments to the contrary, there is little doubt that, viewed simply as a matter of trial convenience . . . the balance of convenience would favor a trial in England. But that is not enough to

> justify a district court in dismissing the complaint of an American citizen, much less to warrant an appellate court's requiring it to do so. The Fifth Circuit said, in Burt v. Isthmus Development Co., 218 F.2d 353, 357, cert. denied, 349 U.S. 922, 75 S. Ct. 661, 99 L. Ed. 1254 (1955), that 'courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country.' We approved that formulation in Vanity Fair Mills, Inc. v. T. Eaton Co., *supra,* 234 F. 2d at 645-646. See to the same effect Mobil Tankers Co., S.A. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir.), cert. denied 385 U.S. 945, 87 S. Ct. 318, 17 L.Ed.2d 225 (1966). Defendants' claims of inconvenience from trial in New York do not measure up to the standards thus required." 468 F.2d at 1344.

Thus, in a case far stronger, indeed overwhelming by comparison, this Court reaffirmed the principle declared in *Olympic Corp.* v. *Societe Generale.*

While, in the absence of an opinion, the standard of balancing applied by the District Court remains unknown, the decision flies in the face of reported decisions by that Court in previous cases. In a pre-*Silver* v. *Great American Ins. Co.* decision denying a *forum non conveniens* motion under both the federal doctrine and the then-New York rule, the District Court stated:

> "Moreover, even were the defendants amenable to process in Ontario, Canada, they have not demonstrated such a compelling case of inconvenience as to require dismissal under the federal doctrine. . . ."
>
> *Fairmont Foods Co.* v. *Manganello,* 301 F. Supp. 832, 837 (S.D.N.Y., 1969) (Pollack, J.).

Judge Pollack's determination was made, in *Fairmont Foods,* on the principles stated by this Court in *Vanity Fair Mills, Inc.* v. *T. Eaton Co.,* 234 F.2d 633 (2d Cir. 1956):

> "Whether jurisdiction should be declined is determined by balancing conveniences, but the plaintiff's choice of forum will not be disturbed unless the ballance is strongly in favor of the defendant. . . . An American citizen does not have an absolute right under all circumstances to sue in an American Court. . . . However, where, as here, application of the doctrine of *forum non conveniens* would force an American citizen to seek redress in a foreign court, courts of the United States are reluctant to apply the doctrine."
>
> 234 F.2d at 645-46.

It is respectfully submitted that the District Court exceeded the permissible boundaries of its discretion by assuming facts and circumstances which the defendant could not and did not, in candor, claim.

POINT II

Ellis-Barker's consent to be sued in an English court was not a waiver of its right to commence an action in an American court.

In challenging the jurisdiction of the District Court to hear Ellis-Barker's breach of contract claim, the defendant asserts that "the parties have stipulated that actions [under the contract] may only be brought in England before an English court" (A14); thus attempting a tidy, but inaccurate characterization of contract language which does not support such a reading.

The clause invoked by the defendant provides:

> "18. This Agreement and the agency hereby constituted shall be construed and have effect according to

> the Laws of England and any dispute or difference arising between the parties hereunder or regarding anything done or omitted by either party in relation to this Agreement shall be determined in accordance with those laws and in any such dispute the Agent will submit to the Supreme Court of Judicature in England as the sole competent tribunal for determining the same." (A27)

Ellis-Barker does not question that it is bound by the provisions of Paragraph 18 of the agreement, but there is a vast distance (literally, an ocean) between the interpretations given by the parties to language whereby the plaintiff agreed to a limitation of its fundamental rights.

Ellis-Barker has agreed, under the passive language of the agreement, that it will not object to the commencement of an action against it in the English court by Ridgway; that it will not claim any such action should be heard in a New York court which, after all, does have jurisdiction over a resident corporation in an action arising out of a contract partially negotiated and performed in New York. Defendant Ridgway, on the other hand, asserts that Ellis-Barker has totally surrendered its right to commence an action in an American court.

The disparity in effect for an American citizen who consents to be sued in a foreign court without jurisdictional objection and one who agrees that any dispute arising must be submitted, by either party, to a chosen foreign forum is so great that the party drafting the agreement must be held to the highest standards of clarity.

Those cases recognizing that a plaintiff has surrendered its right to choose a forum deal with contract provisions clearly delineating the rights and duties of the respective parties. True forum-stipulation clauses are common and leave no room for doubt as to what the parties meant. The party against whom the provision will operate has fair and

unmistakable notice of what the future will hold and the sole question is enforceability.

Compare, for example, the language used in some litigated forum clauses:

> "Any dispute arising must be treated before the London Court of Justice."
>
> *M/S Bremen* v. *Zapata Offshore Company,* 407 U.S. 1 (1972).

> "All suits, whether in law or in equity, commenced under this Agreement shall be brought in the appropriate jurisdictional court in the State of Oregon."
>
> *Hodom* v. *Stearns,* 32 A.D.2d 234, 301 N.Y.S.2d 146 (4th Dep't 1969).

> "Any disputes arising between the Master or owner and members of the crew . . . shall be submitted to and settled by the proper competent authorities of the Republic of Panama . . ."
>
> *Hernandez* v. *Cali, Inc.,* 32 A.D.2d 192, 301 N.Y.S. 2d 397 (1st Dep't 1969).

> "Licensee [the plaintiff] further agrees that it will bring any legal proceedings arising out of this Agreement only in the Courts of Record of Philadelphia County, Pennsylvania . . ."
>
> *Lev* v. *Aamco Automatic Transmissions, Inc.,* 289 F. Supp. 669 (E.D.N.Y., 1968).

Recently, the Court of Appeals for the Fifth Circuit decided a case virtually indistinguishable from the case before this Court. The opinion of the Court speaks eloquently for the rationale urged by the plaintiff-appellant and, for that reason, is reproduced here in full:

> "PER CURIAM:
>
> "Appellant, Thomas S. Keaty, seeks review of the district court's refusal to exercise jurisdiction of his

breach of contract action against Freeport Indonesia, Inc. (Freeport). The lower court based its dismissal on the following contract provision:

> "'This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York.'

"The sole issue with which we must contend is whether this above quoted provision constitutes a mandatory forum-selection clause, requiring that any action under the contract be brought only in the courts of New York. We hold that it does not and reverse for further proceedings.

"Uncontroverted facts, as shown by the complaint, control. Keaty, a resident of New Orleans, Louisiana, entered into a two year employment contract with Freeport, a Delaware corporation doing business in Louisiana, but with its principal office elsewhere, whereby he was to establish and supervise a job training program for local Indonesians at the site of Freeport's West Irian, Indonesia facilities. While Keaty was still in Indonesia, his services were terminated by Freeport prior to the expiration date of the contract. Keaty returned to the United States and initiated suit for damages for breach of contract against Freeport in the United States District Court for the Eastern District of Louisiana. Diversity jurisdiction was asserted. Freeport moved to dismiss the action pursuant to the quoted contract provision, asserting that the language, 'and the parties submit to the jurisdiction of the courts in New York,' constituted a mandatory forum-selection clause which the court should honor. The action was dismissed and the instant appeal followed.

"The trial judge by his dismissal order defined what he considered the sole issue to be determined as, 'whether this court in a diversity action should decline to exercise its jurisdiction in light of the mutually

agreed upon provision in the parties contract *limiting the forum to New York.*' (emphasis supplied). It is apparent that the trial judge assumed that the contract provision in question constituted a mandatory forum-selection clause. This assumption we find to be erroneous.

"We note initially that this is not a situation where the contract, on its face clearly limits actions thereunder to the courts of a specified locale. See, M/S Bremen v. Zapata Off-Shore Co., 1972, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 ('Any dispute arising must be treated before the London Court of Justice.'); Central Contracting Co. v. Maryland Casualty Co., 3 Cir. 1966, 367 F.2d 341 ('The subcontractor agrees that it will not commence any action, . . . arising out of . . . this subcontract agreement, in any Courts other than those in the County of New York, State of New York . . .'). Neither is this a situation involving an adhesion contract whereby contract provisions are literally forced upon the weaker party. See, e. g., Bisso v. Inland Waterways Corp., 1955, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911. Instead we are confronted here with a negotiated contract provision subject to opposing, yet reasonable, interpretations.

"Through the affidavit of its Employment Coordinator in New Orleans, Freeport alleges that the questioned contract provision 'was intended to evidence the agreement of both parties thereto that the law of the State of New York would govern all disputes arising under the contract and that any such disputes would be litigated only in the State or Federal Courts located within the State of New York.' On the other side, Keaty acknowledges his intent to have the law of the State of New York govern all contract disputes, but states that he merely intended to submit to the jurisdiction of the New York courts if sued there; he did not intend to waive his right to sue or be sued elsewhere. We find both interpretations of the contract provision to be reasonable.

"When previously confronted with two opposing, yet reasonable, interpretations of the same contract provision, this Court adopted the traditional rule whereby, 'an interpretation is preferred which operates more strongly against the party from whom [the words] proceed.' Tenneco, Inc. v. Greater LaFourche Port Comm'n, 5 Cir. 1970, 427 F.2d 1061, 1065, quoting from Restatement of Contracts Sec. 236(d) (1932). The contract agreement, including the challenged provision, was put into written form by Freeport and must therefore be construed more strongly against it. We find that the disputed contract provision falls short of being a mandatory forum-selection clause and accordingly hold that the district court erred in its refusal to accept jurisdiction. Rather it should proceed to the merits of the contract dispute between the parties."

Keaty v. *Freeport Indonesia, Inc.*, 503 F.2d 955 (5th Cir. 1974).

The sole difference between *Keaty* and the contract to be construed by this Court is that the Ridgway draftsman has explicitly, rather than by implication, expressed Ellis-Barker's agreement not to object to jurisdiction by requiring Ellis-Barker to submit to the English court "as the sole competent tribunal for determining the same".

As *Keaty* so aptly demonstrates, it sometimes happens that the draftsman of a contract fails to provide for the unforeseen eventuality which does, in fact, occur. In the interests of justice and stability of contract interpretation, Ellis-Barker ought not to suffer, ex-post facto, from Ridgway's failure to say what it now claims it meant to say.

POINT III

The District Court's extension of New York law applicable to forum limitation clauses was unwarranted.

The defendant, having characterized Paragraph 18 of the distribution agreement as a venue selection or forum limi-

tation clause, urged the District Court to decline jurisdiction on grounds of (i) federal common law, (ii) English law, and (iii) New York law. Even assuming *arguendo* that Paragraph 18 does amount to a severe restriction of Ellis-Barker's right to an American forum, the District Court's decision to enforce such a provision on the facts in this case creates an injustice to the plaintiff which New York's limited rule is designed to prevent.

Again, in the absence of an opinion, the law on which the District Court relied must remain unknown. It is assumed, however, that New York law was applied, since it is the only law properly applicable in this diversity case, involving no federal question, in which the issue is, essentially, "door-closing". *National Equipment Rental Ltd.* v. *Reagin,* 338 F.2d 759 (2d Cir. 1964); *Cf., Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198 (1956); *Angel* v. *Bullington,* 330 U.S. 183 (1947).

It is only within the last decade that the courts of New York State have begun to relax a strict rule against enforcing forum limitation clauses. In a 1961 case, the Appellate Division of the Supreme Court of the State of New York, Fourth Department, stated the long-standing policy of New York:

> "Under the present state of the New York authorities, a contract or agreement which attempts to confer exclusive jurisdiction upon the courts of another state or country to the exclusion of the New York courts will be declared to be void as against public policy, if it is attempted to be set up as a bar to an action which would otherwise be maintainable in New York."
>
> *Kyler* v. *United States Trotting Association,* 12 A.D.2d 874, 210 N.Y.S.2d 25, 26-27 (4th Dep't 1961).

When in 1966, a forum limitation clause was in issue before the Appellate Division, First Department, the Court

declared that "[i]nstead of the contract stipulation being unenforcible, whether it should be enforced is now a matter resting in the sound discretion of the court." The relaxation of the rule occurred in a case with virtually no New York contacts. *Export Insurance Co.* v. *Mitsui Steamship Co., Ltd.*, 26 A.D.2d 436, 274 N.Y.S.2d 977 (1st Dep't 1966).

> "The action was brought by a cargo underwriter incorporated in New York but based in Houston, Texas, as subrogee of a Japanese buyer of goods, for alleged damages to the goods caused by defendant carrier, a Japanese steamship company. The goods were purchased from a Mexican company and were shipped from Mexico to Japan. . . .
>
> "It may be, as argued by the appellant, that this dispute derives from a transaction initiated in Japan. Affidavits of the plaintiff support the premise that the bill of lading was issued in Los Angeles, California; that the insurance for the cotton involved was placed by a New York corporation; that the cotton was ordered by that corporation from its Mexican subsidiary and was shipped from Mexico; and that the damage was sustained prior to the arrival of the goods in Japan." 26 A.D.2d at 437, 274 N.Y.S.2d at 979, 980.

Because the record in *Export Insurance* was insufficient to decide "whether the dictates of reason and obvious convenience should cause New York to yield to Japan" (26 A.D.2d at 438, 274 N.Y.S.2d at 981), the Court affirmed the lower court's refusal to dismiss, with leave to the defendant to renew the motion on a complete record. Of particular interest to the appellate court was whether the plaintiff New York corporation did any business in New York.

The other case involving a forum limitation clause in which the New York appellate court sanctioned a dismissal is *Hernandez* v. *Cali, Inc.*, 32 A.D.2d 192, 301 N.Y.S.2d 397 (1st Dep't 1969), a South American seaman's action against a Panamanian ship-owner for personal injury dam-

ages under shipping articles providing for the exclusive application of Panamanian law and the submission of all disputes to the proper competent authorities of Panama. The only connection with New York was the occurrence of the accident in New York harbor, where the vessel was docked. The Court affirmed the lower court's dismissal, in an opinion which relies on the *forum non conveniens* principles of the *Gulf Oil* case (32 A.D.2d at 195, 301 N.Y.S.2d at 400) and deems the existence of the forum limitation clause one reason for dismissing a case involving nonresidents. The Court inferred (at 195, 401) that "the provision for exclusive jurisdiction under Panamanian law was for the convenience of all parties"; an inference far from applicable to the facts before this Court.

Under the *Gulf Oil* standards, the Court could find "no good reason" why the case should not be tried in Panama (32 A.D.2d at 195, 301 N.Y.S.2d at 401). As one other factor in weighing the balance of convenience, and in what appears to be a misapprehension as to the nationality of the Colombian plaintiff, the Court commented that Panama "would be a forum where all parties would have some measure of familiarity with the law which must govern the case" (32 A.D.2d at 195, 301 N.Y.S.2d at 401). A strong dissent by Mr. Justice Nunez objected to the departure from the then-New York *forum non conveniens* rule and emphasized the presence of the necessary medical witnesses in New York.

Subsequent decisions by the same court have viewed *Hernandez* v. *Cali, Inc.* as a *forum non conveniens* case. See, e.g., *Martin* v. *Mieth,* 42 A.D.2d 892, 347 N.Y.S.2d 590 (1st Dep't 1972); *Lambiris* v. *Neptune Maritime Co.,* 38 A.D.2d 528, 326 N.Y.S. 2d 864 (1st Dep't 1971). In *Martin* v. *Mieth,* the Court indicated that the forum limitation agreement in *Hernandez* v. *Cali, Inc.* was a distinguishing factor to be considered on a *forum non conveniens* motion.

In short, New York courts have not relaxed the rule against enforcement of forum limitation clauses to the point of closing the door against a New York citizen in a claim involving a contract substantially performed in New York against a defendant for whom a trial in New York would not be the kind of inconvenience sufficient to support a *forum non conveniens* dismissal. The contracts in both *Export Insurance Co.* v. *Mitsui Steamship Co., Ltd.* and *Hernandez* v. *Cali, Inc.* involved claims which could have arisen anywhere in the world whereas in the context of the Ellis-Barker-Ridgway relationship, it is clear that damages suffered by Ellis-Barker could easily arise out of Ridgway's activities in the New York market.

It is disturbing that the most recent case decided in the Southern District of New York which is relevant to the issue did not review the standards adopted by the state courts for the exercise of discretion with respect to forum limitation clauses. Rather, the Court appeared to lump the "adoption of a less rigid rule" by New York with a "modern trend" of forum limitation enforcement. *Davis* v. *Pro Basketball, Inc.*, 381 F.Supp. 1, 3 (S.D.N.Y. 1974).

On the record before this Court, the defendant has attempted to build what is, at best, ambiguous contractual language into a "forum stipulation" clause which would not, in any event, be enforced by the applicable state law. The courts of New York have not shown a willingness to relinquish jurisdiction in any case which does not meet *forum non conveniens* standards for declining jurisdiction, and federal courts do not sit in removed diversity cases to deprive litigants of rights available in a state court.

It is respectfully submitted that the District Court in finding an "enforcible forum stipulation" went beyond the bounds set by the courts of the State of New York.

CONCLUSION

For the foregoing reasons, the order of the District Court dismissing the complaint in this action should be reversed in all respects.

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 31st day of MARCH 1975

.....John A. Rumsey.....
Attorneys for APPELLEE

D.'d

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Clerk